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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE UNITED STATES OF AMERICA,
Respondent,

v.

W. DARRELL ZANG and LOUIS PORTER,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION ONE

1. WAS LOUIS PORTER DENIED A FAIR TRIAL BY THE TRIAL COURT'S VIOLATION OF THE FUNDAMENTAL FAIRNESS REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY:

   a. The trial court's refusal to admit evidence generated by the administrative agency involved in this case which bears directly on the good faith of the defendant and impeaches the government's position on the meaning of those regulations, which were the keystones of the government's case; and

   b. Then refusing to instruct the jury on the only theory of defense, that of good faith.

2. WERE THE PREVIOUS DECISIONS OF THIS COURT VIOLATED AND LOUIS PORTER DENIED DUE PROCESS OF LAW, A FAIR TRIAL AND HIS RIGHT TO A UNANIMOUS JURY VERDICT WHEN THE DISTRICT COURT PERMITTED CHARGES OF CONSPIRACY, MAIL AND WIRE FRAUD TO BE PROVED BY EVIDENCE OF AN OVERT ACT (IN THE GUISE OF A FALSE EXCULPATORY STATEMENT) WHICH OCCURRED AFTER THE ALLEGED SCHEMES HAD REACHED FRUITION

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To The Honorable Supreme Court of the United States:

Comes now Louis Porter, as Petitioner, pursuant to Supreme Court Rule 21 and submits the following in support of his Petition for Writ of Certiorari to review a decision and judgment of the United States Court of Appeals for the Tenth Circuit:

REFERENCE TO OFFICIAL REPORTS

The official reference to the decision of the Court of Appeals is: United States of America v. W. Darrell Zang and Louis Porter, 703 F.2d 1186 (10th Cir. 1982). (Appendix 2)

GROUNDS OF JURISDICTION

The jurisdictional bases upon which a petition is founded are:

1. The opinion and judgment of the United States Court of Appeals for the Tenth Circuit, dated the 7th day of June, 1982. (Appendix 2)

2. A timely Motion for Rehearing was filed by the Petitioner, Porter and the government timely filed a Motion for Rehearing as well. The Motion for Rehearing of Mr. Porter was denied by Order of the Court entered on the 10th day of January, 1983. (See Appendix 3) The government's Motion for Rehearing was denied by Order of the Court entered on the 26th day of April, 1983. (See Appendix 4)

3. The jurisdiction of this Court is invoked under 18 USC § 3772 and Rule 17(1)(a) and (c) of The Supreme Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF PROCEDURE INVOLVED

Provisions of law applicable to the case are:

a. The 5th Amendment to the Constitution of the United States — Appendix 1, p. 1
b. The 6th Amendment to the Constitution of the United States — Appendix 1, p. 1
c. Rule 401, Federal Rules of Evidence — Appendix 1, p. 2
d. Rule 801, Federal Rules of Evidence — Appendix 1, p. 2
e. Rule 803, Federal Rules of Evidence — Appendix 1, p. 3
f. Rule 803(8) (B) & (C), Federal Rules of Evidence — Appendix 1, p. 5
g. Rule 30, Federal Rules of Criminal Procedure — Appendix 1, p. 1
h. Rule 52(b), Federal Rules of Criminal Procedure — Appendix 1, p. 1
i. 18 USC §371 — Appendix 1, p. 8

j. 18 USC §1341 — Appendix 1, p. 9
k. 18 USC §1343 — Appendix 1, p. 9

STATEMENT OF THE CASE

Louis Porter and Darrell Zang[1] were indicted on April 2, 1980, in a sixteen count indictment. Count I of the indictment alleged a conspiracy to defraud two entities, the United States and Western Crude Oil, Inc. (hereinafter "Western") a company engaged in the business of buying, selling and transporting crude oil. The remaining fifteen counts alleged violations of federal law for mail fraud, wire fraud and racketeering. (18 USC §§371, 1341, 1343 & 1962(a), Appendix 1) The mail and wire fraud counts all alleged a scheme to defraud only Western. (See Indictment, Appendix 2)

The case was tried in September of 1980, resulting in conviction of the defendants on all counts. The defendants were both sentenced to concurrent terms of five years imprisonment and were each fined the maximum amount permissible, $49,000. Additionally, the trial court entered a judgment of forfeiture under the RICO statute forfeiting the defendants' interest in the Dalco Building jointly owned by Mr. Porter and Mr. Zang.

Mr. Porter has been in the oil and gas business most of his working life and had built Dalco, Inc. into a successful company. The company was in the process of filing a registration statement with the SEC. During the audit Mr. Porter was advised by the accountants that there *may* have been some violations of the then effective regulations of the Department of Energy (DOE) and that *perhaps* the transactions were illegal. (Appendix 2, 703 F.2d at 1192)

The genesis of the criminal prosecution was Dalco's voluntary disclosure of the crude oil trading transactions to the DOE at Mr. Porter's direction. These transactions formed the predicate for the indictment and were allegedly

[1] The parties hereto, pursuant to Supreme Court Rule 21(1)(b) are: the United States of America, Louis Porter and Darrell Zang.

the method by which the conspiracy and the mail and wire fraud schemes were carried out. (Appendix 2, 702 F.2d at 1191 & 1194) Instead of indicting Mr. Zang and Mr. Porter under the provisions of law relative to violation of the DOE regulations (a misdemeanor under 15 USC §754) the government chose to indict them for conspiracy, mail and wire fraud and RICO.

The regulations which were the focal point of the indictment were adopted to control the price of oil, (10 CFR §212 et seq.) and were only in effect for several years. During this period Dalco primarily through the efforts of Mr. Zang engaged in the trading of crude oil.

The Court of Appeals held that the "method" by which the alleged mail and wire fraud schemes were accomplished was by miscertification of the tier within which the oil traded fell (by virtue of the age of the well producing the oil) which resulted in a price miscertification which the government contended defrauded Western because it caused Dalco to breach its contract with Western.

The Court of Appeals held that an invoice and letter, (The "BAC" invoice and the "Falcon" letter) both directed to third parties were admissible as false exculpatory statements produced after the commission of a crime and could be used to show consciousness of guilt. The trial court's instruction (Appendix 6, TR. 2104), however, did not limit the jury's consideration of the Falcon letter and BAC invoice to the conspiracy count alleging conspiracy to defraud the government. Instead the instruction permitted the jury to consider this evidence as consciousness of guilt as to *all* counts of the indictment including the conspiracy count to defraud Western and the mail and wire fraud counts which were solely directed at Western. (Appendix 6, TR. 2104 & Indictment, Appendix 5)

The trial court also refused to instruct the jury on the only theory of the defense — Mr. Porter's good faith. The government contended on appeal that trial counsel for Mr. Porter had not preserved the error as required by Rule 30

of the F.R. Crim. P. by failing to properly object to the court's failure to give the instruction. The Tenth Circuit adopted the government's argument and refused to review the trial court's failure to instruct on the only defense available to Mr. Porter. (Appendix 2, 703 F.2d at 1196)

The trial court said with reference to the refusal of the instructions (although not at the instruction conference):

> "[A]nd it's unnecessary but any objection not sustained by the Court, *or any instruction requested and not given*, all parties who are put in that position are granted an exception to the Court's ruling." (TR. 1757)

And again at Page 1834 of the Transcript:

> "Although stated earlier, all parties are granted exceptions to rulings of the Court that are not in conformity to their thinking *or anything that they have submitted*, to make the record clear on it."

Following the Court's instructions to the jury, counsel for Mr. Porter, in at least partial compliance with Rule 30 made the following objection:

> "We would adopt the objections of counsel as made on behalf of Zang. The only thing I want to do is the ones we raised back in conference as far as timing is concerned and state at this time if this is the proper time we want to reallege our objection.
>
> * * *
>
> *Also* we object to the Court's refusal to give *all* of the instructions we submitted. To that extent that's the only objection we have, Judge."

On Petition for Rehearing, the Tenth Circuit refused to notice this as "plain" or fundamental error. (Denial of Mr. Porter's and Mr. Zang's Petition for Rehearing, Appendix 3)

During the trial the defendants attempted to introduce Exhibits 6, 7, 8 & 9 which were portions of GAO reports which the defendants contended were admissions by a party opponent (the government) of the vagueness and

uncertainty as to meaning of the DOE regulations. The Petitioner contends that they were admissible under the provisions of Rule 401, Rule 801 (d) (2) (C) and Rule 803 (8) (B) & (C). (Appendix 1)

The petitioner contends that each of the errors claimed individually are sufficient to deny him fundamental fairness in the context of a fair trial and the Due Process Clause and that cumulatively they rise to the level of a deprivation of Due Process and are contrary to the prior decisions of this court as well as being in conflict with the decisions of other circuits and even in conflict with the decisions of the Tenth Circuit.

Reasons Why the Writ Should Be Granted

QUESTION ONE

WAS LOUIS PORTER DENIED A FAIR TRIAL BY THE TRIAL COURT'S VIOLATION OF THE FUNDAMENTAL FAIRNESS REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY:

a. The trial court's refusal to admit evidence generated by the administrative agency involved in this case which bears directly on the good faith of the defendant and impeaches the government's position on the meaning of those regulations, which was the keystone of the government's case; and

b. Then refusing to instruct the jury of the only theory of defense, that of good faith.

Mr. Porter was deprived of the only defense available to him in this case, that of good faith and lack of criminal intent, by the exclusion of Exhibits 6, 7, 8 & 9 and the trial court's refusal to instruct on the theory of defense.

The Tenth Circuit's opinion agrees that the defendants were entitled to an instruction on their theory of defense, as a matter of law. *U.S.* v. *Prazak*, 623 F.2d 152 (10th Cir. 1980) (Appendix 2, 703 F.2d at 1196) When the trial court refused the defendants' good faith instructions, coupled with exclusion of the defendants' Exhibits 6, 7, 8 & 9, only the ceremonies of the law remained. The only defense available to Mr. Porter had been removed from the jury's consideration.

The circuit court said that since the defendants were charged with fraud and not with violating the price controls, that evidence of the fact that the government could not interpret its own regulations was inadmissible, because irrelevant and because the defendants did not rely on opinions of regional counsel for the DOE showing the DOE's confusion as to their meaning. (Appendix 2, 703 F.2d at 1195)

This evidence goes directly to the issue of the good faith. These documents demonstrated that the agency which adopted the regulations and its regional counsel could not decide what the interpretation should be. They were admissions by a party opponent and thus admissible under Rule 801(a)(2). If the DOE was confused, the government should not be permitted to convict Mr. Porter of a bad faith failure to interpret them. This is coupled with the fact that the dictating of this letter and accompanying invoice was his only objective act alleged in the conspiracy count. When that letter was admitted into evidence without an instruction limiting its consideration by the jury to the allegations of defrauding *not* Western but the government this was tantamount to conviction of Mr. Porter on all counts. (See the discussion infra under Question Two)

The only defense available to Mr. Porter was good faith. When he was deprived of his requested instructions on good faith and was denied the use as evidence the government documents which clearly indicated that the DOE could not determine the meaning of its own regulations, all semblance of due process disappeared from the case.

If the defendants could have in good faith believed that price followed tier, instead of vice-versa as contended by the government, then the jury could have concluded that the defendants were not acting in bad faith and with the requisite criminal intent in certifying the tier level of the oil sold to Western. This is particularly true considering the burden upon the government to prove the necessary criminal intent beyond a reasonable doubt, a fact the circuit court said could only be proven circumstantially or inferentially in this case. (Appendix 2, 703 F.2d at 1191 & 1192) Conversely, it could only be negated circumstantially or inferentially.

As the Tenth Circuit said:

> "Thus the conspiracy conviction will be sustained if from the circumstances, acts and conduct of the appellants it can reasonably be inferred that they agreed to miscertify the crude oil with the intent to defraud." (Appendix 2, 703 F.2d at 1191)

By the same token if from the facts, circumstances and the DOE's conduct, as evidenced by Exhibits 6 through 9, it can be inferred Mr. Porter was acting in good faith, then the jury was entitled to weigh in the balance of Mr. Porter's good faith, the government's inability to decide what the regulations meant.

The exclusion of these exhibits which showed the government's confusion as to the meaning of the tier-price regulation bore directly on the issue of the defendants' good

faith. If it was possible for the government to conclude that the regulations were unclear, this admission against interest was admissible on the issue of whether they were equally unclear to the defendants.

The Tenth Circuit, on page 19 of the opinion, held the exhibits were excluded by the trial court on the grounds of relevancy and held therefore that trial court's discretion would not be disturbed on appeal. When the relevance is as great as it was here on the issue of good faith, when coupled with the trial court's refusal to instruct on good faith, the court's refusal to admit the exhibits rises not only to the level of abuse of discretion but to the level of denying Mr. Porter a fair trial within the constitutional mandate of the Due Process Clause.

It is respectfully submitted that this level of the trial court's abuse of discretion and the Tenth Circuit's approval of the exclusion of the most persuasive evidence of the defendants' good faith coupled with its denial of a good faith instruction invokes this Court's supervisory, superintending powers.

The true meaning of Rules 401, 801 and 803 of the Federal Rules of Evidence should be vindicated by this Court in the circumstances here present which permit Due Process to be denied in the guise of the trial court's discretion.

The Tenth Circuit's opinion ignores Rules 401, 801 and 803 and equally ignores its duty, particularly in the context of this case, to reverse plain error by the trial court. Indeed, this Court can notice plain error, even though not raised on appeal. The Tenth Circuit disposes of the trial court's failure to instruct on the only defense available to Mr. Porter by saying they could not review the failure to give the defendants requested instructions on good faith as there was not a specific enough objection under Rule 30 of the F.R. Crim.P. On Motion for Rehearing the Court of Appeals declined to consider this as plain error. (See discussion, infra)

Rule 803(8)(B) and (C) demonstrate conclusively the exhibits were admissible. Certainly it must be said that they are at the very least an admission of a party opponent under Rule 801(d)(2). The circuit court also rejected the exhibits on the ground the defendants did not rely on them. (Appendix 2, 703 F.2d at 1195) Even the *government*, in the courts below did not rely upon the fact that the defendants had not relied upon these documents for their interpretion of federal certification requirements. We know of no case or legal theory that requires that evidence which is highly relevant to the good faith of the defendants, (and would demonstrate that the very adversary which is now prosecuting them, could not interpret its own regulations) must be relied on by the defendants to be admissible. It is the fact that the regulations were vague and uncomprehensible, even to the government, which was to be proved by the exhibits. The Tenth Circuit has engrafted onto Rules 801(d)(2) and 803(8)(B) & (C) a requirement not contained in the rules and not supported by case law. It has decided a question of federal law which is wholly inconsistant with both the Congressionally adopted Rules and the substance of the rule transmitted by this Court to Congress on November 20, 1972.

It should now be made plain that clearly admissible evidence of government confusion within its own ranks as to the meaning of its regulations, is both relevant and admissible when the defendants confusion as to the meaning of those regulations is claimed to have been in good faith. The fact is that the government documents contained in Exhibits 6 thru 9 demonstrated that the government acknowledged that the tier-price regulations were vague, ambiguous and confusing. To be admissible, it is not necessary that the defendants have relied upon the government saying the regulations were vague and confusing. It was obvious to the DOE that they were vague and confusing. If

that be true, it is an equally permissible inference that they were vague and confusing to the defendants. This is evidence of the highest order bearing on the good faith of the defendants.

The Court of Appeals held that the defendants had waived their rights under Rule 30 of the Federal Rules of Criminal Procedure to raise on appeal the issue of the failure of the court to give the theory of the defense instruction on good faith. The Opinion agrees that " . . . a defendant is entitled to an instruction if there is support in the evidence and the law." (Appendix 2, 703 F.2d at 1196)

However, the court went on to hold that the good faith instructions requested by the defendants could not be reviewed because the defendants did not make a proper objection under Rule 30 of the F.R. Crim. P.

It has been long settled, even in the Tenth Circuit, that failure to give a good faith instruction in a mail fraud case is *reversible error.* See *Steiger* v. *U.S.*, 373 F.2d 133 at 135 (10th Cir. 1967). The court however refused to consider that issue because it held the failure to fully comply with Rule 30 of the F.R. Crim. P. constituted a waiver. It is respectfully submitted that in the face of such a harsh result which eviscerated Mr. Porter's only defense should require the Court of Appeals and this Court to notice it as plain or *fundamental error* under the provisions of Rule 52(b) F.R. Crim. P. and the principles noted in *Vance* v. *Terrazas*, 444 U.S. 252 at 258, footnote 5.

To say that the failure to give the theory of the defense instruction based upon what, at worst, can only be described as a procedural misstep which was not only

encouraged, but also joined in by the trial court[2] is to raise form over substance to the point where it violates the Fifth Amendment Due Process. The Fifth Circuit has decided a case directly contrary to this case, with reference to the plain error doctrine. In *Mann* v. *United States*, 319 F.2d 404 (5th Cir. 1963). The Court in *Mann* held:

> "Counsel for Dr. Mann did not object to the charge as required by Rule 30 of the Federal Rules of Criminal Procedure. The sole defense of Dr. Mann was his contention that he did not intend to evade or defeat, the tax imposed; and he denied that his conduct was willful or that he had any evil motive or intent to defraud. We think that error affecting such a vital aspect of the case is fundamental. Rule 52(b) Federal Rules of Criminal Procedure provides:
>
> > "Plain Error. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.
>
> As stated in Bloch:
>
> > 'The error of the trial court is . . . fundamental and goes to the very essence of the case, so we must, under the rule, take notice of it.' "

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[2] The trial court obviously thought he had permitted the defendants to adequately protect the record by their objections. He said:

"[A]nd it's unnecessary, but any objection not sustained by the Court, or *any instruction requested and not given*, all parties who are put in that position are granted an exception to the Court's ruling." (TR. 1757) (Emphasis added)

And again:

"Although stated earlier, all parties are granted exceptions to rulings of the Court that are not in conformity to their thinking or *anything that they have submitted to make the record clear* on it." (TR. 1834) (Emphasis added)

The decision of the Tenth Circuit is thus directly in conflict with the Fifth Circuit's decision and the cases cited therein. The Tenth Circuit's holding in this case further violates both the spirit and the letter of this Court's per curiam opinion in *Silber* v. *U.S.*, 370 U.S. 717, (1962) in which the Court said:

> "Although the trial court squarely considered and decided the issue raised by the Motion to Dismiss, it was apparently not presented to the Court of Appeals and was not briefed or argued in this Court. While ordinarilly we do not take note of errors not called to the attention of the Court of Appeals nor properly raised here, that rule is not without exception. The court has the 'power to notice a "plain error" though it is not assigned or specified,' United Brotherhood, C.J. v. United States, 330 U.S. 395, 412, 91 Law Ed. 973 987, 67 Sup. Ct. 775. 'In exceptional circumstances, especially in criminal case, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' United States v. Atkinson, 297 U.S. 157, 160, 80 Law Ed. 555, 557, 56 Sup. Ct. 391. Our own rules provide that 'the Court, at its option, may notice a plain error not presented.' Revised rules of the Supreme Court of the United States Rule 40(1)(d)(2). See also F. R. of Crim. P. 52(b)."

As Chief Justice Burger observed in *Groppi* v. *Leslie*, 404 U.S. 496 (1972):

> "This Court has often recognized that the requirements of due process cannot be ascertained through mechanical applications of a formula. See e.g., Cafeteria Workers v. McElroy, 367 U.S. 886, 894-895 (1961); Hannah v. Larche, 363 U.S. 420 (1960). Mr. Justice Frankfurter, in another context, aptly stated that due process 'is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. . .' "

When Louis Porter faced the jury at the conclusion of the evidence with his crucial exhibits having been excluded, coupled with the trial court's refusal to instruct upon his only defense the Due Process Clause had become in this case a "mere form of words".

QUESTION TWO

WERE THE PREVIOUS DECISIONS OF THIS COURT VIOLATED AND LOUIS PORTER DENIED DUE PROCESS OF LAW, A FAIR TRIAL AND HIS RIGHT TO A UNANIMOUS JURY VERDICT WHEN THE DISTRICT COURT PERMITTED CHARGES OF CONSPIRACY, MAIL AND WIRE FRAUD TO BE PROVED BY EVIDENCE OF AN OVERT ACT (IN THE GUISE OF A FALSE EXCULPATORY STATEMENT) WHICH OCCURRED AFTER THE ALLEGED SCHEMES HAD REACHED FRUITION

The Court of Appeals said in its opinion:

> "The appellants argue that the evidence concerns balancing Dalco's tier inventory, which is unrelated to the fraud charges. We disagree. Miscertification was the method by which the fraud was perpetrated. The invoice and the letter were attempts to prevent the detection of the tier miscertification."

It is respectfully submitted that this analysis does not take into consideration the purpose of the fraud alleged in the mail and wire fraud schemes or the conspiracy scheme as to Western.

The purpose of the mail and wire fraud schemes as alleged in the indictment, was to *defraud Western* by miscertifying oil. (See the Indictment, Paragraph 19, Appendix 5, page 6)

The indictment alleges that the scheme and artifice to defraud was perpetrated by entering into contracts for the sale of oil to Western and that the defendants would fraud-

ulently certify old oil (lower tier) as new oil (upper tier). The purpose of the scheme and artifice to defraud, according to Paragraph 19(c) of the indictment was to cause Western to pay a higher overall price for the oil.

The indictment alleges that the purpose of both the conspiracy and wire fraud schemes as to Western was the acquisition of the excess profit. Thus, once the defendants had realized that profit, the purpose, not only of the conspiracy, alleged in Count One as to Western, but also the mail and wire fraud schemes relating only to Western, had reached fruition since the sole objective of these alledged schemes was to obtain the money. Once the money was received, the defendants had no further interest in what Western, or anyone else, did with those invoices or with the oil which had been certified. See *Kann* v. *U.S.*, 323 U.S. 88, (1944) *Parr* v. *U.S.*, 363 U.S. 370 (1960) and *U.S.* v. *Maze*, 414 U.S. 395 (1974).

The indictment alleges in Counts Two through Seven that the defendants in furtherance of the scheme and artifice to defraud, and *"to obtain money and property* by means of false and fraudulent pretenses and representations" caused the mailing of invoices to Western Crude Oil, the last of which was mailed on February 13, 1978.

Counts Eight through Fifteen of the Indictment alleged that in order to *obtain money and property* by means of false and fraudulent pretenses and in executing the scheme to do so, that the defendants caused the transmission of telegrams transferring money to their account. The last transfer of funds to the account of either Dalco Crude, Inc. or Dalco, Inc. occurred on August 21, 1978. Thus, under the scheme alleged and as shown by the evidence, on August 21, 1978, the scheme alleged in the indictment as to Western in the conspiracy count and as to all the mail and wire fraud counts had reached fruition. On August 21st, the defendants had acquired all of the money from Western that was their alleged objective. *Kann, Parr & Maze*, supra. The court below, in its opinion, held that the Falcon letter,

which was not even written until September 8, 1978 and the BAC invoice, which was dated March 31, 1978, constituted, or the jury could have so found, false exculpatory evidence.

An examination of the allegations of the indictment and the evidence presented by the government can lead only to the conclusion that neither the BAC invoice nor the Falcon letter could have constituted false exculpatory evidence insofar as the conspiracy and the mail and wire fraud counts as to *Western*. Once the purpose of the conspiracy and the scheme to defraud had reached fruition, the Falcon letter could not have been a part of those counts as the money had already been obtained. It was not alleged nor is there any evidence of, nor did the government contend, that the BAC letter was intended to *lull Western* into any false sense of security. There is no lulling allegation in the indictment as to Western.

The sole basis on which the BAC invoice and Falcon letter were admitted into evidence was to show, according to the Tenth Circuit's Opinion, that the defendants were attempting to prevent the detection of the tier miscertification *by the government*. In order to constitute false exculpatory evidence, the evidence must in fact, at least in the minds of the defendants, tend to exculpate them. Thus, under the Tenth Circuit's reasoning, it must be said that the purpose of the invoice and the letter, had they been disclosed to Western would have tended to negate in the mind *of the object* of the conspiracy and the scheme (Western), the existence of the alleged conspiracy and scheme.

In order to test the validity of whether, in fact, the invoice and letter *could* be false exculpatory evidence vis-a-vis both the conspiracy and the mail and wire fraud schemes designed *only to affect Western* and not the government, the critical question is: *"If the invoice and letter*

had been known to Western would these have tended, even in the minds of the defendants, to exculpate them from their having defrauded Western by submitting false invoices?"

The answer is unequivocally, No! Had Western fully known of the contents of the invoice and letter, the defendants could not have believed the invoice and letter would in any way exculpate them from the alleged false certification to Western.

The Circuit Court said:

> "The invoice and the letter were attempts to prevent the detection of the tier miscertification." (Appendix 2, 703 F.2d at 1191)

Adopting this test, if the invoice and the letter had been known to Western, it would not in any way have tended to prevent Western from detecting any tier miscertification because the letter and invoice had absolutely nothing to do with any miscertification to Western.

While it is possible of conception that the invoice and the letter may have tended to prevent the detection of the tier miscertification by any subsequent audit by DOE, that could be relevant only to the count of the indictment alleging a conspiracy to defraud the *government*. This Count (Count 1, Appendix 5, at pgs. 1 thru 10) also alleges that the purpose of the conspiracy was to defraud Western. There is no way to tell whether the defendants were convicted by the jury of defrauding Western *or* the government. These documents could in no way have been an attempt to prevent the detection of the alleged tier miscertification insofar as both the conspiracy count and the mail and wire fraud counts to defraud Western were concerned, even in the minds of the defendants.

Had these documents been known to Western, it would have meant nothing to Western except that Dalco had traded in foreign oil.

While the Court of Appeals did not discuss it in its Opinion, the government conceded in its brief that the BAC invoice and Falcon letter *would not exculpate the defendants from the charge of violating their contract with Western.* (Brief of the United States in the Tenth Circuit, pg. 38)

Thus, these documents could not be admissible to show "consciousness of guilt" or bear on the question of the defendants' "intent" on any of the counts as to Western, when even the government admitted they would not exculpate the defendants as to defrauding Western.

It is axiomatic that each count of the Indictment must be considered separately. *Gainey* v. *U.S.*, 318 F.2d 795 (10th Cir. 1963).

The question then becomes: If the mail and wire fraud counts were *separate* and the only counts in the Indictment, would the letter and invoice have been admissible? Given the government's admission that it *"would not exculpate appellants from the charge of violating their contract with* Western . . ." it is clear that the Tenth Circuit's holding that these documents were admissible as false exculpatory statements insofar as the mail and wire fraud counts are concerned was clearly in error. If the statements admitted as false exculpatory statements do not even tend to exculpate the defendants, by definition they are not admissible.

The Tenth Circuit reasoned that the letter and invoice were attempts to prevent the detection of the tier miscertification. This, however, could only go to the issue of conspiracy to defraud the goverment by attempting to cover up the tier imbalance. The invoice and the letter would have had no meaning at all to Western and certainly were not false exculpatory statements admissible under the conspiracy count alleging Western's having been defrauded.

The jury obviously utilized this letter and its accompanying invoice to determine Mr. Porter's consciousness of guilt as to the scheme and conspiracy to defraud Western when it could not by definition have exculpated him from either the conspiracy or the schemes alleged as to Western.

By virtue of the manner in which Count I of the indictment was drafted (alleging a conspiracy against two separate entities) there is no way to determine if the jury convicted the defendants of conspiracy to defraud (a) the government or (b) Western. If the jury by its verdict intended to find a conspiracy to defraud Western only, the conspiracy count conviction cannot stand because the letter and invoice were admissible only as to the claimed conspiracy to defraud the government. Futhermore, there is no possible way to determine if some jurors felt that the defendants were only guilty of a conspiracy to defraud the government and other jurors felt that the Defendants intended to defraud only Western. Since the highly prejudicial "false exculpatory statements" were permitted to be considered by the jury as to both "victims" in the conspiracy count (as well as all other counts) the defendants were denied their right to a unanimous jury verdict as that right is guaranteed to them by the Sixth Amendment to the Constitution of the United States. (See the analysis of Sixth Amendment in the concurring opinion of Mr. Justice Powell in *Johnson* v. *Louisiana*, 406 U.S. 356 at 366 et seq. (1972))

There is no way to determine if the jury convicted the defendants of conspiracy to defraud the government or conspiracy to defraud Western. If the jury found a conspiracy to defraud Western *only*, the conspiracy count conviction cannot stand and thus there must be a new trial as to *all counts*. The RICO Counts of course are dependent for their validity on conviction of the defendants on at least two substantive counts.

These documents were admitted by the trial court without any limiting instruction that they could only be considered by the jury as to Count I and then only as to alleged conspiracy to defraud the government. The Tenth Circuit Opinion states (Appendix 2, 703 F.2d at p. 1191) that the jury was *carefully* instructed as to its use of the alleged false exculpatory statements. However, they were only partially instructed as they were permitted by the trial court's charge to consider them false exculpatory statements as applicable to all counts of the indictment. When this occurred, improper evidence impeaching Mr. Porter's good faith as to all of the transactions with Western was improperly before the jury. When this error was coupled with the trial court's failure to instruct on the issue of Mr. Porter's good faith it was tantamount to directing a verdict of conviction.

The Circuit Court approved the trial court's admission of this highly prejudicial letter and invoice which could only be admissible even conceivably on the conspiracy count as to the DOE. When coupled with the failure to even instruct on the only theory of defense available to Mr. Porter — good faith — the trial court permitted his good faith to be impeached by clearly inadmissible evidence. When this is added to the fact that he was not permitted to introduce the most cogent evidence of his good faith — the government's own interpretation of the regulations — which showed that they were so confusing not even the government could discern their meaning, the error was compounded in geometric proportion. Each of these errors singly prevented Mr. Porter from receiving a fair trial. Together they denied him any semblance of due process and the "fundamental fairness" mandated by the Fifth Amendment Due Process Clause.

To imprison, for five years, a businessman, who has led a blameless life, until his conviction in this case; to confiscate a portion of his office building; and to impose the maximum fines possible, while denying this man the benefit of the

evidence in Exhibits 6 through 9 and the benefit any instruction on good faith is to relegate the concept of due process to a "mere form of words".

With the evisceration of the defense of good faith by these compound, plain and fundamental errors, Lou Porter was denied a fair trial and Due Process of Law.

He was condemned on the issue of intent by the erroneous admission of the BAC invoice and Falcon letter on the conspiracy and mail and wire fraud counts as to Western and then prevented from introducing the most highly relevant evidence of his good faith — the government's admissions that the regulations were vague, ambiguous and confusing. When these errors are coupled with the trial court's refusal to instruct on the defense he had — Good Faith — the errors reached constitutional proportions.

Finally, the rationale of the Courts opinion in *Washington v. Texas* is brought directly to bear on the trial of Louis Porter by the trial court's refusal to admit Exhibits 6 through 9:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 US 14, 19, (1967)

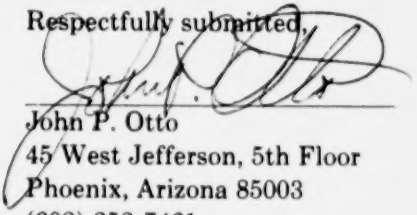
We would ask the question, of what use is the Sixth Amendment right to compel the attendance of witnesses if the documentary evidence produced by those witnesses can be arbitrarily withheld from the jury when it bears directly on the critical issue in this case?

The Petitioner prays this Court issue a Writ of Certiorari to the U. S. Court of Appeals for the Tenth Circuit in this cause.

JOINDER

Pursuant to Rule 19(4) of the Rules of this Court the Petitioner, Louis Porter joins in the Petition for Certiorari filed by his co-defendant, Mr. Darrell Zang.

Respectfully submitted,



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APPENDICES

Appendix 1: 5th Amendment to the Constitution of the United States

6th Amendment to Consitution of the United States

Rule 52 (b), Federal Rules of Criminal Procedure

Rule 30, Federal Rules of Criminal Procedure

Rule 401, Federal Rules of Criminal Procecdure

Rule 801, Federal Rules of Evidence

Rule 803 (8) (B) & (C), Federal Rules of Evidence

18 USC §371
18 USC §1341
18 USC §1343

Appendix 2: Opinion of the Court of Appeals for Tenth Circuit

Appendix 3: Order denying Petitioner's Petition for Rehearing

Appendix 4: Order denying the government's Petition for Rehearing

Appendix 5: Indictment

Appendix 6: Court's instruction to the jury
Re: False Exculpatory Statement

APPENDIX 1

5th Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6th Amendment to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accursation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such

requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a

trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Pub.L. 93—595, § 1, Jan.2, 1975, 88 Stat. 1938.

RULE 803

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bod-

ily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).—Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the pro-

visions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.—Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry.—To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations.—Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.—Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records.—Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.—The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.—A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.—Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.—Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises.—To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.—Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history.—Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character.—Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction.—Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain

the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries.—Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

18 USC § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 USC § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91—375, § 6 (j) (11), 84 Stat. 778.

18 USC § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of execut-

ing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523.

APPENDIX 2

UNITED STATES of America,
Plaintiff-Appellee,

v.

W. Darrell ZANG and Louis Porter,
Defendants-Appellants.

Nos. 80-2227, 80-2228.

United States Court of Appeals,
Tenth Circuit.

June 7, 1982.

Rehearing Denied April 26, 1983.

Defendants were convicted in the United States District Court for the Northern District of Oklahoma, James O. Ellison, J., of conspiracy, mail fraud, wire fraud, and racketeering and forfeiture was also imposed. The Court of Appeals, Seth, Chief Judge, held that: (1) certain false exculpatory documents were properly admitted to show consciousness of guilt; (2) conspiracy convictions were supported by the evidence; (3) evidence showed the existence of a RICO enterprise; (4) trial court properly excluded evidence of DOE regulations; (5) trial court's instructions were proper; (6) statute making it a misdemeanor to miscertify crude oil was not a lesser included offense; (7) Emergency Petroleum Allocation Act regulations did not preempt Title 18 criminal statutes as they applied to defendant's activities; but (8) building owned by RICO partnership was subject to forfeiture only to the extent that the partnership interest was acquired through RICO investments.

Affirmed and remanded.

1. Criminal Law — 351(10)

False exculpatory statements made by a defendant are admissible to prove, circumstantially, consciousness of guilt or unlawful intent.

2. Criminal Law — 351(10)

Where miscertification of crude oil was the method by which fraud was perpetrated, false invoice and letter prepared to indicate existence of transaction which had not taken place were attempts to prevent the detection of the miscertification and were properly admitted as evidence of consciousness of guilt or unlawful intent.

3. Criminal Law — 338(7)

Balancing of probative value of evidence against its prejudicial effect is left to the discretion of the trial court.

4. Conspiracy — 24

Agreement in a conspiracy may either be expressed or implied; parties must have a meeting of the minds in the common design, purpose, or objects of the conspiracy.

5. Conspiracy — 47(6)

Evidence that one defendant formed corporation primarily for crude oil resale, that the volume of business was large and that the transactions grossed some $7,500,000 in profit, of which only $93,000 represented legitimate profit, that the two defendants signed personal loan guarantees to cover monthly crude oil purchases, and that defendants were aware of the very high profits was sufficient to sustain conspiracy conviction involving miscertification of crude oil. 18 U.S.C.A. § 371.

6. Fraud — 69(5)

Evidence that tier designations on crude oil enable the government to determine entitlements and that other companies reported tier information to the Department of Energy based on their misapprehension of the nature of the crude sold by the defendants was sufficient to permit a finding that the miscertification by the defendants of their lower tiered crude oil impacted upon and disrupted the entitlements program of the government and thus defrauded the government.

7. Fraud — 69(5)

Where there is sufficient evidence to show that a federal program has been disrupted, the evidence is sufficient to support a finding of fraud against United States.

8. Post Office — 35(2)

To warrant a conviction under the mail fraud statute, the government must prove that a scheme to defraud exists and that a mailing was made for the purpose of that scheme. 18 U.S.C.A. § 1341.

9. Post Office — 35(8)

Mail fraud statute requires that the mails be an integral part of the scheme to defraud; item mailed must be an integral part of the execution of the scheme. 18 U.S.C.A. § 1341.

10. Post Office — 35(8)

Where scheme to defraud depended upon invoices which miscertified crude oil, the mailing of those invoices was necessary and an integral part of the scheme so that defendants could be convicted of mail fraud. 18 U.S.C.A. § 1341.

11. Commerce — 82.5

Under RICO statute, the government must prove both the existence of an enterprise and a connected pattern of racketeering activity. 18 U.S.C.A. §§ 1961—1968.

12. Commerce — 82.5

Fact that partnership received handling fee for crude oil transactions which involved mail fraud demonstrated an ongoing association for purposes of engaging in interstate commerce under the RICO statute and partnership was thus an enterprise for RICO purposes. 18 U.S.C.A. §§ 1962, 1963.

13. Commerce — 82.5

Predicate acts of mail and wire fraud which concerned fraudulent miscertification of crude oil tiers were sufficiently related to the defendant's enterprise of selling crude oil to support a RICO conviction. 18 U.S.C.A. § 1962.

14. Commerce — 82.5

Trial court which instructed the jury that an activity of racketeering includes any act which constitutes a violation of the mail or wire fraud statutes, which stated that the Government would adequately prove the pattern of racketeering if it proved at least two of the wire and mail fraud counts was not required to also explain that the two are said to be related in order to constitute a pattern. 18 U.S.C.A. § 1962.

15. Criminal Law — 894

Parties can waive their right to a special verdict by not making a timely request. Fed.Rules Crim.Proc. Rule 31(e), 18 U.S.C.A.

16. Criminal Law — 894

Defendants who did not request special verdict until after the jury had been instructed and who objected to any communication from the court to the jury to remedy the problem waived their right to special verdict. Fed.Rules Crim.Proc. Rule 31(e), 18 U.S.C.A.

17. Criminal Law — 1175

Where evidence was uncontroverted so that no factual issues were left to be decided by the jury and the jury, by convicting the defendants on one particular count, invoked the forfeiture provision, there was no reversible error in failing to use special verdict. Fed.Rules Crim.Proc. Rule 31(e), 18 U.S.C.A.

18. Commerce — 82.5

By finding defendants guilty of RICO violation, jury invoked forfeiture provisions. 18 U.S.C.A. §§ 1962, 1963(a)(1).

19. Commerce — 82.5

Meaning of the term "interest" in the RICO forfeiture provision can be derived from the type of activities barred by the RICO Act. 18 U.S.C.A. §§ 1962, 1963(a)(1).

20. Commerce — 82.5

Where defendants were charged with the use or investment of racketeering income to acquire an interest in an enterprise, the interest which was subject to forfeiture was any interest in an enterprise acquired or maintained through racketeering income. 18 U.S.C.A. §§ 1962, 1963(a)(1).

21. Commerce — 82.5

Defendants' interest in a partnership which was acquired by tainted funds was subject to forfeiture under the RICO act. 18 U.S.C.A. § 1963(a)(1).

22. Commerce — 82.5

Entire building was not necessarily subject to forfeiture on a basis of defendants' RICO violation; that portion of the RICO partnership's interest in the building which was acquired by racketeering funds was subject to forfeiture. 18 U.S.C.A. § 1963.

23. Criminal Law — 338(1)

Relevancy of evidence offered at trial is within the discretion of the trial court.

24. Fraud — 69(4)

Where defendants were charged with fraud, not with violating federal oil price controls, evidence of pricing regulations for crude oil which were allegedly confusing and vague was properly excluded.

25. Criminal Law — 448(16)

In defendants' trial for fraud based on alleged miscertification of crude oil tiers, court properly excluded portion of letter written on behalf of defendants' firm to the Economic Regulatory Administration setting forth the firm's interpretation of the regulations; court did not abuse its discretion

in determining that the legal opinion expressed in the letter was an expert opinion by a witness who was unavailable for cross-examination and in admitting only the factual portion of the letter.

26. Criminal Law — 769

Admission or exclusion of a jury instruction is within the discretion of the trial court.

27. Criminal Law — 770(2)

Defendant is entitled to an instruction if there is support in the evidence.

28. Criminal Law — 830

Where compliance or noncompliance with crude oil pricing regulations did not affect application of the wire fraud and mail fraud statutes under which defendants were charged, trial court properly denied defendants' pricing and certification instructions.

29. Criminal Law — 795(2)

Defendant is entitled to a lesser-included-offense instruction when the lesser offense is established by the evidence adduced at trial; inherent relationship must exist between the two offenses.

30. Indictment and Information — 191

Violation of Emergency Petroleum Allocation Act regulations was not a lesser included offense of defendants' conspiracy, mail fraud, wire fraud, and racketeering offenses involving miscertification of crude oil tiers. 18 U.S.C.A. §§ 371, 1341, 1343, 1962.

31. Criminal Law — 1043(2)

In the absence of specific objection to absence of good-faith instructions, court could not review the contention on appeal. Fed.Rules Crim.Proc. Rule 30, 18 U.S.C.A.

32. Statutes — 159

Implied repeal requires a positive repugnancy between the provisions of the two laws.

33. War and National Emergency — 302, 305

Congress did not intend to make the Emergency Petroleum Allocation Act the exclusive remedy for miscertification of oil tiers and EPAA Regulations did not preempt or impliedly repeal the conspiracy, wire fraud, mail fraud, RICO or other Title 18 criminal statutes as they applied to miscertification of oil. Emergency Petroleum Allocation Act of 1973, § 5, 15 U.S.C.A. § 754; 18 U.S.C.A. §§ 371, 1341, 1343, 1961—1968.

B. Hayden Crawford, Tulsa, Okl. (Joe D. Dillsaver, Tulsa, Okl., with him on the brief), of Crawford, Crowe & Bainbridge, Tulsa, Okl., for defendant-appellant W. Darrell Zang.

John A. Field, III, of Jerris Leonard & Associates, P. G., Washington, D. C. (James C. Lang and William J. Wenzel, of Sneed, Lang, Adams, Hamilton, Downie & Barnett, Pat Malloy and Pat Malloy, III, of Malloy, Thompson & Malloy, Tulsa, Okl., with him on the briefs), for defendant-appellant Louis Porter.

Stephen P. Learned, U. S. Dept. of Justice, Washington, D. C. (Frank Keating, U. S. Atty., N. D. Okl., Tulsa, Okl., with him on the brief), for plaintiff-appellee.

Before SETH, Chief Judge, McWILLIAMS, Circuit Judge, and BRIMMER, District Judge*.

SETH, Chief Judge.

The defendants, W. Darrell Zang and Louis Porter, were convicted by a jury of one count of conspiracy (18 U.S.C. § 371), six counts of mail fraud (18 U.S.C. § 1341 and § 2), eight counts of wire fraud (18 U.S.C. § 1343 and § 2), and one count of racketeering (18 U.S.C. § 1962(a), § 1963, and § 2). The

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* Honorable Clarence A. Brimmer, Chief United States District Judge for the District of Wyoming, sitting by designation.

court sentenced each of the defendants to five years on each count to be served concurrently, a total fine of $49,000, and ordered the forfeiture, pursuant to 18 U.S.C. § 1963(a)(1), of the defendants' respective interests in Dalco Investments, which included an interest in the Dalco Building.

The facts leading up to their indictment and conviction concern the purchase and resale of crude oil. The government alleged that from approximately December of 1976 through September of 1978 the appellants fraudulently miscertified over one million barrels of lower tier priced controlled crude oil as higher tier crude oil resulting in an illegal profit of nearly 7.5 million dollars.

Mr. Porter owned, among other businesses, a company known as Dalco Petroleum, Inc. which had as one of its wholly owned subsidiaries, Dalco Crude, Inc. (Dalco). In 1976 he formed Dalco Crude, Inc. to operate a crude oil and natural gas liquids trading business. Mr. Porter hired Mr. Zang to run the enterprise. Mr. Zang had previously been the vice president and regional manager of Western Crude Oil, Inc. (Western). As the manager of Dalco Crude Mr. Zang received an annual salary and an interest in the profits. Later in January of 1978 Dalco Crude, Inc. was succeeded by Dalco, Inc., a company owned jointly by Mr. Porter and Mr. Zang.

In December of 1976 Dalco negotiated with Cities Services (Cities) for the purchase of 310,000 barrels of low tier crude oil. Under that contract Dalco would pay Cities' acquisition cost which was based on posted prices for crude oil, the gathering charges or pipeline fees, plus 24 cents per barrel. Dalco simultaneously resold the crude to Western. Under the contract with Western Dalco received an acquisition cost based on posted prices, plus 19 cents per barrel.

The basis for the indictment was that Dalco recertified the lower tier crude oil from Cities as high tiered crude oil and thus a higher priced crude, when it was resold to Western. The then prevailing price control regulations required the producer to certify the tier of the oil sold and each reseller was required to certify the crude to its purchaser to be of the same tier as the certification it received. The certification was usually typed on the reseller's invoice. As a reseller Dalco was thus required to pass onto Western the same tier designation it had received for the oil. Because of the fraud perpetrated through miscertification the government alleged that Dalco overcharged Western $7,482,837.

Similar arrangements were negotiated between Cities and Western through July of 1978. Dalco negotiated for the purchase and resale of about 15,000 barrels per day, and over a fifteen-month period 7,629,442 barrels were traded in this manner.

Mr. Porter claims that he had no involvement in the transaction except for financing. He claims that Mr. Zang was in charge of preparing the invoices and that he was never aware of any violations until September or October of 1978. Mr. Zang claims that he did not intend to defraud Western, downstream purchasers, or the United States. He argues that he made a good-faith effort to comply with what he described as the confusing and complicated pricing and certification regulations. The appellants advance several points on appeal:

1. What had become known as the BAC invoice and Falcon letter were improperly admitted into evidence;

2. The conspiracy convictions were not supported by the evidence;

3. The trial court should have dismissed the RICO count;

4. Several of the defendants' exhibits concerning the DOE regulations were improperly excluded;
5. The trial court wrongfully denied defendants' requested jury instructions;
6. The Emergency Petroleum Allocation Act (EPAA) implicitly preempts Title 18.

The appellants argue that the BAC invoice and the Falcon letter were improperly admitted as false exculpatory evidence. These documents resulted from an attempt by Mr. Zang and Mr. Porter to cover up the crude oil certification imbalance. Thus on March 31, 1978 Mr. Porter had prepared and placed in Dalco's file an invoice from BAC Petroleum billing Dalco $275,000 as BAC's commission for arranging Dalco's purchase of foreign crude from Falcon Petroleum, Ltd. This transaction allegedly occurred in March and April of 1978 in an effort to balance Dalco's incoming and outgoing crude oil tier certification. This liability was questioned in late August of 1978 when an outside auditor asked why the liability had not been paid. Mr. Porter explained that since Dalco was unable to obtain port facilities the offer of foreign crude oil had to be turned down, but he and John Draughon, his business partner from BAC, agreed to the $275,000 commission.

However, the accountants requested confirmation of this liability. Mr. Porter explained that confirmation would be difficult to obtain since Mr. Draughon was reluctant to claim an interest in the foreign company, Falcon, because of tax reasons. On September 8, 1978 Mr. Porter dictated a letter to Allen McNaughton of Falcon Petroleum in Bermuda. The letter recounted the alleged transaction and requested that Dalco be allowed to withhold payment temporarily. At Mr. Porter's direction no file copies were made and one copy was sent to Dalco's controller to show the outside auditors. This "Falcon letter" was returned marked "addressee unknown." Mr. Porter told his secretary to forget about it. However, based on the BAC invoice, the Falcon letter, and Mr. Porter's assurances that the transac-

tion was valid, the liability was left on the books at the end of the year. The record demonstrates that Mr. Draughon had no such interest in Falcon Petroleum. Falcon Petroleum did not exist and Dalco never had such a foreign crude oil transaction.

The appellants claim that the BAC invoice and the Falcon letter are not really false exculpatory evidence. They argue that the foreign crude oil transaction meant to balance their certificates would not have exculpated them on the government's theory of fraud. And, even if it was proper false exculpatory evidence, they argue it caused unfair prejudice and confusion so the trial court should have excluded it.

[1] False exculpatory statements made by a defendant are admissible to prove circumstantially consciousness of guilt or unlawful intent. *United States v. Ingram*, 600 F.2d 260 (10th Cir.); *United States v. Tager*, 481 F.2d 97 (10th Cir.). Such statements cannot be considered by the jury as direct evidence of guilt. *United States v. Boekelman*, 594 F.2d 1238 (9th Cir.).

The trial court admitted these documents noting that the evidence was allowed to show intent. The trial court carefully instructed the jury that a defendant's attempt to fabricate evidence after an alleged violation of the law is not sufficient to establish guilt.

[2] The appellants argue that the evidence concerns balancing Dalco's tier inventory, which is unrelated to the fraud charges. We disagree. Miscertification was the method by which the fraud was perpetrated. The invoice and the letter were attempts to prevent the detection of the tier miscertification. Thus we find that there was no error in admitting the documents as false exculpatory evidence. The judge fully instructed the jury on the use of such evidence; therefore, it was for the jury to weigh the testimony

and the evidence and determine whether the false exculpatory evidence indicated a consciousness of guilt or nothing at all. *See United States v. Ingram*, 600 F.2d 260 (10th Cir.).

[3] The balancing of the probative value of evidence against its prejudicial effect is left to the discretion of the trial court. We will reverse only for a clear showing of abuse of discretion. *United States v. Harris*, 534 F.2d 207 (10th Cir.). The evidence was offered for a specific purpose, the jury was properly instructed, and thus the invoice and letter were properly admitted into evidence.

As to the conspiracy charge, the appellants contend that the evidence was insufficient to support the jury's verdict. Specifically they argue that the government never produced evidence of an unlawful agreement between them.

[4] We have held in many cases that the agreement in a conspiracy may be either express or implied, and that the parties must have a meeting of the minds in the common design, purpose, or objects of the conspiracy. *United States v. Lopez*, 576 F.2d 840 (10th Cir.); *United States v. Butler*, 494 F.2d 1246 (10th Cir.). Frequently the agreement to cooperate is not susceptible of direct proof because the nature of the crime and the unlawful agreement may be established by circumstantial evidence. *United States v. McMahon*, 562 F.2d 1192 (10th Cir.); *McManaman v. United States*, 327 F.2d 21 (10th Cir.). In determining the sufficiency of the evidence the inferences drawn are reviewed in the light most favorable to the government. *United States v. Erb*, 596 F.2d 412 (10th Cir.). Thus the conspiracy conviction will be sustained if from the circumstances, acts, and conduct of the appellants it can reasonably be inferred that they agreed to miscertify the crude oil with the intent to defraud. *See United States v. Parnell*, 581 F.2d 1374 (10th Cir.); *United States v. Anderson*, 352 F.2d 500 (6th Cir.).

[5] Mr. Porter formed Dalco Crude, Inc. which later became Dalco, Inc. primarily for crude oil resale. The volume of business in the fifteen-month period was large and the transactions grossed some $7,595,964 in profit, of which only $93,129 represented legitimate profit. To obtain the multimillion dollar letters of credit to cover the monthly crude oil purchases Mr. Porter and Mr. Zang signed personal loan guarantees. Additionally, Mr. Porter pledged the stock of his public company, Great Yellowstone Corporation, as a guarantee. The financial stakes were high for both Mr. Porter and Mr. Zang. The volume of oil traded, the personal guarantees, and the inordinately high profits make the transaction one in which the jury could reasonably infer that Mr. Porter was well aware of the nature, scope, and value of the transaction. Also, it may be readily inferred from the evidence that Mr. Zang and Mr. Porter worked together to design the scheme and to attain its objective.

The government also introduced evidence directed to Mr. Porter's knowledge of the very high profits. In early January of 1977 two Dalco auditors spoke with Mr. Porter about the Cities-Western transaction. They had noticed that the outgoing invoices certified the 310,000 barrels of crude oil at a higher tier designation than had the incoming invoices for the same crude oil. Although they knew very little about the federal pricing and certification regulations, they did realize that the transaction cleared unusually high profits. Richard Clark, a subsidiary company president, also testified that he reviewed the regulations and concluded that the transaction was possibly illegal. All three testified that they told Mr. Porter about the problem and he simply referred them to Mr. Zang. All three resigned shortly thereafter citing as the reason the manner in which the crude oil trading was being handled.

In early March of 1978 the accounting firm of Haskins and Sells examined invoices dated in December of 1977 as part of a fee proposal. These invoices indicated that Dalco resold 750,000 barrels of crude oil at a penny less per barrel

than it had paid for it. Nevertheless Dalco grossed a $450,000 profit. This was accomplished by changing the low tier certification to upper tier crude and stripper. These accountants testified that they pointed out the irregularity to Mr. Porter and showed him the invoices. Mr. Zang had told them that he was trying to "balance" the tiers. Furthermore he told them that they must review the entire year to determine if the tier certifications were balanced. The auditors requested documentation but they never received any and consequently the firm resigned from the audit. About the same time Dalco's auditor also resigned.

In the summer of 1978 Mr. Porter engaged the accounting firm of Peat, Marwick and Mitchell to audit both Great Yellowstone Corporation and Dalco. The Peat Marwick auditors pointed out the tier imbalances on the invoices. The firm requested exchange and certification schedules for the entire year from Mr. Porter. Although Dalco never provided those schedules, Peat Marwick prepared a crude oil trading schedule for Dalco based on the auditing information it had gathered. Their audit showed that a tier imbalance existed for the entire year.

Throughout the fifteen-month period Mr. Porter had control over the Dalco profits. Three of the other companies received a portion of the gross profit from each trade. Mr. Zang and Mr. Porter created a partnership, Dalco Investments, which received a handling charge of 25 cents per barrel of oil traded.

Mr. Porter testified that he had nothing to do with the crude oil sales to Western, except for financing. He testified that he was unaware of any DOE violations until late September or early October of 1978. He claims that in arranging the financing of the oil trading, he only generally knew that Dalco was buying and selling the crude oil. He

claimed that he had never specifically read the contracts. Additionally he denied ever being told by Haskins and Sells or any other auditors that the crude oil transactions looked illegal.

The evidence discloses that the oil tier certification systematically enabled Mr. Porter and Mr. Zang to make an inordinately large profit. Their financial investment in the venture was substantial. Evidence indicated that Mr. Porter was told repeatedly that regulations may have been violated and perhaps the transactions were illegal. Mr. Porter's agreement with Mr. Zang can be inferred from Mr. Porter's refusal to investigate the irregularities pointed out by auditors, his association and business ties with Mr. Zang which led to unusually high profits, and the fact that he had a large personal stake in the transaction. From this evidence and its reasonable inferences, a jury could reasonably infer that there was an informed and interested cooperation between Mr. Zang and Mr. Porter to recertify the crude oil invoices in order to defraud Western, and consequently the downstream buyers and the United States.

[6, 7] The appellants also contend that the evidence is insufficient to prove that they conspired to defraud the United States. The indictment charged the defendants with fraud against the United States in its Entitlements Program under the Emergency Petroleum Allocation Act (EPAA).

The Entitlements Program, 10 C.F.R. § 211.67, was a method of equalizing the acquisition costs of a refiner's crude oil. Under the program refiners who purchased and processed lower priced "old" oil in excess of the national average were required to compensate by cash payment the refiners who purchased and processed more expensive "new" oil. The tier designations enable the government to determine the entitlement. If lower tiered crude oil is miscertified as higher tiered crude then the entitlement is deflated.

The government introduced evidence that barrels of crude purchased by Western from Dalco were later sold to Gulf Oil and OKC. Mr. Mills of Western so testified. Tom Fagan and John Madden of Gulf Oil and OKC testified that their respective companies bought crude from Western. OKC was a refiner. Gulf reported its tier information at its refineries to DOE. Reviewing the evidence in the light most favorable to the government, it is reasonable for a jury to infer and find that the miscertification of lower tier crude oil impacted upon and disrupted the Entitlements Program administered by DOE. Where there is sufficient evidence to show that a federal program has been disrupted, the evidence is sufficient to support the finding of fraud against the United States. *See United States v. Johnson*, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681.

The appellants next contend that the evidence is insufficient to support their convictions of mail fraud. They argue that the mailings were not sufficiently related to the alleged scheme to defraud, and thus their conduct was not within the mail fraud statute.

[8] To warrant a conviction under the mail fraud statute the government must prove that a scheme to defraud exists and that a mailing was made for the purpose of that scheme. *United States v. Wolf*, 645 F.2d 23 (10th Cir.). The appellants argue that the indictment charged them with fraudulent miscertification of crude oil tiers on the invoices. They contend that the method of delivering the invoices was irrelevant to the legality of the transaction.

[9, 10] The mail fraud statute requires that the mails be an integral part of the scheme to defraud. *United States v. Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603. This means that the item mailed be an integral part of the execution of the scheme. In this way the use of the mails becomes "incident to an essential part of the scheme." *Pereira v. United States*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435. See also *United States v. Kent*, 608 F.2d 542 (5th Cir.). Clearly the scheme to defraud depended upon the

invoices stating the tier certification. Mailing those invoices was necessary and an integral part of the scheme. Thus the mail fraud counts are supported by the evidence.

The appellants claim several errors with respect to the application of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §§ 1961—1968. In Count 16 of the indictment Mr. Zang and Mr. Porter were charged with receiving monies from a pattern of racketeering and willfully investing that income to acquire an interest in violation of 18 U.S.C. § 1962(a). The racketeering activity alleged consisted of the acts of mail and wire fraud also alleged in the indictment. The indictment further contended that Mr. Zang and Mr. Porter transferred to Dalco Investments approximately $1,067,576 of the profit obtained from the Cities-Western transaction. The government sought forfeiture of the appellants' respective interests in Dalco Investments, including its sole asset, the Dalco Building, pursuant to § 1963(a)(1).

[11, 12] Under RICO the government must prove both the existence of an enterprise and a connected pattern of racketeering activity. *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246. Mr. Porter and Mr. Zang each owned a 50% interest in a partnership called Dalco Investments. The partnership received a handling fee for the Cities-Western crude oil transactions. This constituted an ongoing association for the purpose of engaging in interstate commerce. It was a separate element proved by the government. Thus Dalco Investments was an "enterprise" within the meaning of the RICO statute. As the Court said in *Turkette:*

> "RICO also proscribes the investment of income derived from racketeering activity in an enterprise engaged in or which affects interstate commerce. . . ."

[13] The pattern of racketeering activity is a series of criminal acts as defined by the statute. *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246. In the case before us racketeering activity was the alleged wire

and mail fraud. § 1961(1)(B). To prove a pattern, the government must establish two or more predicate offenses which are related to the activities of the enterprise. *United States v. Scotto*, 641 F.2d 47 (2d Cir.). The jury found the appellant guilty on all counts of mail and wire fraud. Those predicate acts concerned the fraudulent miscertification of crude oil tiers in the Cities-Western transactions. As such they were sufficiently related to the appellants' enterprise of selling crude oil to support the conviction under § 1962.

The appellants claim error in the trial court's instruction to the jury concerning the "pattern of racketeering." The court instructed the jury that to find "a pattern of racketeering activity the law requires at least two acts of racketeering activity." The appellants argue that the trial court's instruction should have also specifically stated that the two acts had to be related to constitute a pattern.

[14] On review we must consider the trial court's instructions as a whole. The trial court instructed the jury that an activity of racketeering includes any act which constitutes a violation of the mail or wire fraud statutes. The court further stated that if the government proved at least two of the wire and mail fraud counts then the pattern of racketeering activity would also be sufficiently proven. See *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir.). Any two of the counts of mail and wire fraud alleged in the indictment were sufficiently related to the enterprise to constitute a violation of RICO. Based on the instructions as a whole, there was no need to explain specifically the required relationship.

The appellants also contend that they were wrongfully denied a special verdict under rule 31(e) of the Federal Rules of Criminal Procedure. This rule provides that "a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." 18 U.S.C. rule 31(e).

The appellants never made a timely request for a special verdict. The court asked the parties to review the verdict form and no objections were made. Once the jury began deliberations the appellants' attorneys brought the rule to the court's attention. However, they objected to any communication from the court to the jury to remedy the problem. They contended that it would be "reversible error and prejudicial to advise the jury on it [special verdict] during their deliberations because it would bring undue emphasis on this particular count [16]."

The trial court ruled that the parties had waived their right to a special verdict. It also determined that the defendants suffered no prejudicial error because the indictment specifically alleged only one enterprise interest subject to the forfeiture provision. Since the evidence was uncontroverted as to the defendants' interests in the partnership the court concluded that there was no issue of fact concerning the tracing of funds or determining specific property to be forfeited.

[15-18] There was no error in the use of a general verdict in this case. The parties can waive their right to a special verdict by not making a timely request. See *United States v. Desmond*, 670 F.2d 414 (3d Cir.); *United States v. Jones*, 425 F.2d 1048 (9th Cir.). In this case the appellants waived their right and no plain error resulted. The evidence was uncontroverted so no factual issues were left to be decided by the jury. The indictment and jury instructions were about the partnership interests involved. By finding the defendants guilty of Count 16, the jury invoked the forfeiture provision. See *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.). Thus there was no reversible error in not using the special verdict.

[19, 20] The appellants also contend that the forfeiture of their interests in Dalco Investments, particularly the Dalco Building, was not supported by the weight of the evidence. The government sought forfeiture under 18 U.S.C. § 1963(a)(1) which provides that any person found in viola-

tion of § 1962 shall forfeit any interest acquired or maintained in violation of § 1962. Even though the "interest" is not specifically defined by the statute, its meaning can be derived from the activities barred by § 1962. The section proscribes three types of activities. The defendants were charged with violating § 1962(a), which prohibits the use or investment of racketeering income to acquire an interest in any enterprise. Thus the interest subject to forfeiture in this case is any interest in an enterprise acquired or maintained through racketeering income.

The enterprise at issue is Dalco Investments, a partnership equally held by Mr. Zang and Mr. Porter. Under the evidence adduced at trial the partnership's sole asset is the Dalco Building. Mr. Porter had transferred a half-interest in the building to Mr. Zang for value. They each contributed their share in the building to the partnership. The partnership received over a million dollars from the Cities-Western transactions, which was in turn used to pay the mortgage on the building.

[21, 22] The appellants' interest in Dalco Investments which was acquired by tainted funds is subject to forfeiture. *See United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir.). Merely contributing the building to a partnership is not prohibited by § 1962. *See United States v. Mandel*, 591 F.2d 1347 (4th Cir.). Thus the entire building is not necessarily subject to forfeiture. However, the partnership's interest in the building which was acquired by racketeering funds is subject to forfeiture under § 1963.

The government presented precise, uncontroverted evidence as to the amount of racketeering income funneled into Dalco Investments. It totaled $1,067,576. The untainted interests which may exist and the interests of innocent third parties should be protected. Thus we remand this issue to the district court to establish terms and conditions of the forfeiture under its authority described in 18 U.S.C. § 1963(c).

[23] The appellants claim that the trial court improperly excluded exhibits 6, 7, 8, 9, and the unpurged portion of exhibit 3. The defendants offered exhibits 6, 7, 8, and 9 in an effort to show that the pricing regulations for crude oil were confusing and vague. The trial court excluded those exhibits on the grounds of relevancy. The relevancy of evidence offered at trial is within the discretion of the trial court. We will not reverse on appeal unless the trial court abused its discretion. *United States v. Montgomery*, 582 F.2d 514 (10th Cir.); *United States v. Ray*, 488 F.2d 15 (10th Cir.).

[24] The defendants were charged with fraud, not with violating federal price controls. Under the indictment the scheme to defraud was executed through the miscertification of the tier of crude oil sold. Pricing violations were not included in the indictment and no evidence was offered that the defendants relied upon those documents for their interpretation of federal certification regulations. Thus the exhibits were properly excluded.

[25] Exhibit 3 is a letter from a Washington law firm to the Economic Regulatory Administration on behalf of Dalco. The letter was written on October 24, 1978. The appellants argue that the letter contains the corporation's interpretation of the regulations which is relevant of the appellants' intent. The court excluded part of the letter constituting a legal opinion, but admitted the factual portions. The court determined that the legal opinion expressed in the letter was like an expert opinion by a witness who was unavailable for cross-examination. We find no abuse of the trial court's discretion in disallowing the admission of that portion of the letter constituting a legal opinion.

[26, 27] The appellants claim error in the trial court's refusal to give a number of the defendants' requested jury instructions. The admission or exclusion of a jury instruc-

tion is within the discretion of the trial court. However, a defendant is entitled to an instruction if there is support in the evidence and the law. *United States v. Prazak*, 623 F.2d 152 (10th Cir.).

[28] The trial court denied the appellants' pricing and certification instructions because they were argumentative. Further under the indictment and evidence presented at trial, the pricing regulations were irrelevant. Compliance or noncompliance with the pricing regulations does not affect the application of the criminal statute. The trial court correctly denied those instructions.

[29, 30] The defendants requested a lesser included offense instruction which was denied by the trial court. The defendants argue that the lesser included offense was a violation of 15 U.S.C. § 754, which makes a violation of the EPAA certification regulations a misdemeanor. A defendant is entitled to a lesser included offense instruction when the lesser offense is established by the evidence adduced at trial. *United States v. Pino*, 606 F.2d 908 (10th Cir.). Additionally, however, an inherent relationship must exist between the two offenses. This does not exist here. A review of the considerations suggested in *United States v. Whitaker*, 447 F.2d 314 (D.C.Cir.), indicates that regulatory violations are not lesser included in offenses of conspiracy, mail or wire fraud, or racketeering. The elements, proof, and interests protected differ greatly. Thus the trial court did not abuse its discretion by denying the instruction.

[31] The good-faith instructions requested by the defendants cannot be reviewed because the defendants never made a proper objection at the time of trial. There is no evidence that the defendants made a specific objection to the denial of these instructions. A generalized objection is insufficient to the matter objected to and the grounds for the objection as required by rule 30. *Maxfield v. United States*, 360 F.2d 97 (10th Cir.).

The appellants also claim that the EPAA regulations preempt or impliedly repeal the Title 18 criminal statutes. Under the EPAA regulations the crude oil reseller can be charged with a misdemeanor for miscertification. Mr. Porter and Mr. Zang were not charged with a violation of that statute, but rather they were charged with criminal violations.

[32, 33] An implied repeal requires a positive repugnancy between the provisions of the two laws. *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755; *Wood v. United States*, 41 U.S. 341, 10 L.Ed. 987. Nothing in the legislative history or the language of the statute indicates a desire by the Congress to make the EPAA the exclusive remedy for miscertification of oil tiers. In *Posadas v. National City Bank*, 296 U.S. 497, 56 S.Ct. 349, 80 L.Ed. 351, the United States Supreme Court said:

> "[R]epeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. . . . [T]he intention of the legislature to repeal must be clear and manifest."

Since we cannot find any intention of Congress to repeal or preempt the criminal statutes by the EPAA, we affirm the trial court's denial to dismiss the indictment.

The appellants' convictions are affirmed, but the case is remanded on the issue of forfeiture, consistent with this opinion.

APPENDIX 3

NOVEMBER TERM — January 10, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges and Honorable Clarence A. Brimmer, Jr.*, District Court Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. LOUIS PORTER and W. DARRELL ZANG, *Defendants-Appellants.*	Nos. 80-2227, 80-2228

This matter comes on for consideration of the petitions for rehearing and suggestions for rehearing in banc filed by appellants in the captioned appeals.

The petitions for rehearing were denied by the judges of the panel that rendered the decision sought to be reheard.

The suggestions for rehearing in banc were transmitted by the clerk to the members of the panel and to the judges who are in regular active service but none requested a vote on the suggestions made by the parties.

Upon consideration whereof, the petitions for rehearing and suggestions for rehearing in banc are denied.

HOWARD K. PHILLIPS, Clerk

*Of the United States District Court for the District of Wyoming, sitting by designation.

APPENDIX 4

MARCH TERM — April 26, 1983

Before Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Court Judges, and Honorable Clarence A. Brimmer, Jr.*, District Court Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. LOUIS PORTER and W. DARRELL ZANG, *Defendants-Appellants.*	Nos. 80-2227 80-2228

This matter comes on for consideration of appellee's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

*Of the United States District Court for the District of Wyoming, sitting by designation.

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA v. W. DARRELL ZANG and LOUIS PORTER	Criminal No. _____ (T. 18 U.S.C. §§371, 1341, 1343, 1962(a), 1963 & 2)

INDICTMENT

THE GRAND JURY CHARGES

That at all times material herein:

COUNT 1

A. INTRODUCTION

1. There was in existence the Emergency Petroleum Allocation Act (EPAA) of 1973, Title 15, United States Code, Section 751, *et seq.*, and the regulations promulgated thereunder, which provided for price controls and mandatory allocation of all crude oil produced in or imported into the the United States.

2. In order to require a producer, seller, or reseller of domestic crude oil to maintain its historic profit margin with respect to designated portions of said crude oil and not to reap windfall profits in a rising price market, the Federal Energy Administration (FEA) and its successor agency, the United States Department of Energy (DOE), agencies of the United States, administered within the Mandatory Petroleum Price Regulations a multi-tier pricing system under which the price that may be charged for domestic crude oil was dependent on the regulatory category of the crude oil.

3. The regulatory categories "old" (also referred to as "lower tier"), "new" (also referred to as "upper tier"), and "stripper" were strictly price control categories and were not based upon any physical or chemical characteristics of

the crude oil but were based upon the history or the level of production from an oil producing property. 10 C.F.R. §§212.71-212.74.

4. "Old" oil (lower tier) had the lower maximum lawful selling price adjusted to the May 15, 1973 selling price for crude oil of like grade and quality coming from the same oil producing property at or below a designated level of production in 1972. "New" oil (upper tier) which referred to crude oil discovered since 1972 or oil obtained from producing properties in excess of the properties' 1972 level of production, had a higher maximum lawful selling price. "Stripper" oil, defined as that crude oil produced from a property whose average daily production per well did not exceed ten barrels per day during the qualifying period, was exempt from price controls and could be sold at the world market price. 10 C.F.R. §212.54.

5. The Mandatory Petroleum Price Regulations provided for a certification requirement with regard to the purchase and sale of domestic crude oil.

6. In the beginning of the relevant time period herein, said certification program, as set forth within the Mandatory Petroleum Price Regulations, provided in pertinent part at 41 F.R. 37309 (September 3, 1976), 10 C.F.R. §212.131(b) (1), that

> Each seller of domestic crude oil, other than a producer of domestic crude oil. . .shall, with respect to each sale of domestic crude oil. . .certify in writing to the purchaser the respective volumes of and respective per barrel prices for the old crude oil, new crude oil, stripper well crude oil, and other domestic crude oils the first sale of which is exempt from the provisions of this part included in the volume of domestic crude oil so sold. The certification shall also contain a statement that the price charged for the domestic crude oil is no greater than the maximum price permitted pursuant to this part.

Although amended in immaterial respects from time to time during the relevant time period at 42 F.R. 41565 (August 17, 1977); 42 F.R. 62897 (December 14, 1977); 42 F.R. 64956 (December 29, 1977); 43 F.R. 26540 (June 20, 1978); and 43 F.R. 33679 (August 1, 1978); this provision of the certification program remained in effect throughout the relevant time period.

7. There was also in existence a regulation requiring firms subject to the Mandatory Petroleum Price Regulations to maintain records sufficient to demonstrate that prices charged were in compliance with the Mandatory Petroleum Price Regulations and to make said records available upon request to the FEA or its successor agency, the DOE. 10 C.F.R. §210.92(a) and (b).

8. The Mandatory Petroleum Allocation Regulations, promulgated by the FEA and its successor agency, the DOE, under authority of the EPAA provided for the allocation of price-controlled domestic crude oil among domestic refiners under what is referred to as the "Entitlements Program." 10 C.F.R. §211.67. The Entitlements Program was maintained by the FEA and the DOE to adjust cost inequities to refiners which result from the multi-tier pricing system for domestic crude oil. Domestic refiners, under the Program, who had purchased and processed lower priced "old" oil (lower tier crude oil) in excess of the national average, determined monthly by the FEA and the DOE from reports filed by the refiners, must compensate those refiners who had purchased and processed more expensive "new" oil (upper tier crude oil) or price exempt oil, thereby tending to equalize the acquisition costs for said domestic refiners.

9. CITIES SERVICE COMPANY (hereinafter "Cities Service"), a recent successor by merger of CITIES SERVICE OIL COMPANY, was a corporation organized under the laws of Delaware with its principal office in Tulsa, Oklahoma, and was engaged in the production, sale, and transportation of crude oil.

10. WESTERN CRUDE OIL, INC. (hereinafter "Western") was a corporation organized under the laws of Delaware with its principal office in Denver, Colorado, and was engaged in the business of buying, selling, and transporting crude oil.

11. GREAT YELLOWSTONE CORPORATION, presently existing and operating under the name of DALCO PETROLEUM CORPORATION, was a corporation organized under the laws of the State of Nevada, having its principal place of business in Tulsa, Oklahoma, and was engaged in the general oil and gas business and in the manufacture of insulation products and steel fabrication.

12. DALCO, INC., was a corporation organized under the laws of the State of Oklahoma, with its principal office in Tulsa, Oklahoma, was engaged in crude oil trading, and on May 31, 1978, became a subsidiary of GREAT YELLOWSTONE CORPORATION.

13. DALCO CRUDE, INC., was a corporation organized under the laws of the State of Oklahoma, with its principal office in Tulsa, Oklahoma, was engaged in crude oil trading, and was a subsidiary of DALCO PETROLEUM, INC.

14. DALCO PETROLEUM, INC., was a corporation organized under the laws of the State of Oklahoma, with its principal office in Tulsa, Oklahoma, was engaged in the general oil and gas business, and on May 31, 1978, became a subsidiary of GREAT YELLOWSTONE CORPORATION.

15. LOUIS PORTER, chairman of the board and chief executive officer of GREAT YELLOWSTONE CORPORATION owned all or part of the stock of, and controlled, GREAT YELLOWSTONE CORPORATION, DALCO, INC., DALCO CRUDE, INC., and DALCO PETROLEUM, INC.

16. W. DARRELL ZANG, a director of and second largest stockholder of GREAT YELLOWSTONE CORPORATION, was a part owner of DALCO, INC.

17. DALCO INVESTMENTS was a partnership, operating under the laws of Oklahoma, and at all times material herein was owned fifty per cent (50%) each by LOUIS PORTER and W. DARRELL ZANG, and constituted an "enterprise" as defined by Title 18, United States Code, Section 1961(4), which was engaged in activities which affect interstate commerce.

B. THE CONSPIRACY AND ITS OBJECTS

18. Beginning in approximately December, 1976 and continuing up until approximately September, 1978, within the Northern District of Oklahoma and elsewhere, defendants

W. DARRELL ZANG AND LOUIS PORTER

knowingly, willfully, and unlawfully combined, conspired and agreed with each other to commit certain offenses against the United States, to-wit:

(a) *to use the mails*, and cause the use of the mails in furtherance of a scheme and artifice to defraud and for obtaining *money and property* by means of false and fraudulent pretenses, representations and promises from *Western* and to defraud indirectly others unknown who were *subsequent purchases* of crude oil obtained from Western or from each other, in violation of 18 U.S.C. §1341; once money obtained this was over
(b) *to transmit*, and cause to be transmitted, in interstate *commerce by means of wire communication*, certain signs, writings and sounds *for the purpose of executing a scheme and artifice to defraud and for obtaining money and property by means of false and*

fraudulent pretenses, representations and promises from Western and to defraud indirectly others unknown who were subsequent purchasers of crude oil obtained from Western or from each other, in violation of 18 U.S.C. §1343; and

(c) *to defraud the United States of America, and* in particular, the Federal Energy Administration and its successor agency, the Department of Energy, of their right to *have the Mandatory Petroleum Price* Regulations promulgated by those agencies administered honestly, fairly, and free from corruption, fraud, deceit, deception, concealment, and unlawful means.

C. MEANS OF THE CONSPIRACY AND OF THE SCHEME AND ARTIFICE TO DEFRAUD BOTH WESTERN AND THE UNITED STATES

19. Among the manner and means employed by the defendants W. DARRELL ZANG and LOUIS PORTER to effectuate the objects of the aforesaid conspiracy and to further the scheme and artifice to defraud were the following:

(a) The defendants would cause DALCO CRUDE, INC., and later DALCO, INC. (hereinafter referred to interchangeably as "DALCO"), owned by and/or controlled by defendants, to enter into a series of contracts with Cities Service, whereby Cities Service would sell quantities of West Texas and New Mexico crude oil to DALCO which crude oil, at the time of sale, was in pipelines or in storage terminals attached to pipelines in the West Texas area.

(b) The defendants would cause DALCO to enter into a corresponding series of contracts with Western whereby DALCO would sell to Western the same crude oil in the West Texas pipelines or storage terminals that DALCO had purchased from Cities Service. With the exception of certain gathering and handling

charges, the contracts with Western provided that DALCO would charge Western for the crude oil delivered no more than what DALCO paid Cities Service for said crude oil.

(c) In submitting invoices to Western under these contracts, defendants would falsely and fraudulently certify that certain portions of the crude oil sold was new oil (upper tier) or stripper oil when, in truth and in fact, as defendants well knew, said portions of crude oil was old oil (lower tier) and had been certified to DALCO as such by Cities Service, thereby causing Western to pay a higher overall price for the crude oil purchased from DALCO than agreed to under the terms of the contract, to-wit: in excess of seven million dollars ($7,000,000) during the relevant time period.

(d) In concealing from Western the fact that Western was buying fraudulently certified crude oil, defendants would cause Western to unknowingly and unwittingly pass on the fraudulent certifications to subsequent purchasers, affecting the price paid by subsequent purchasers of the crude oil, and thereby causing Western and each subsequent seller of the crude oil, should the fraudulent certifications be discovered, to become potentially liable to its immediate purchaser for reimbursement.

(e) In order to give the false impression to anyone, including auditiors or FEA/DOE examiners, that DALCO was attempting or had attempted to balance DALCO's discrepancy in crude oil certifications with foreign crude oil purchases, defendants would create fictitious entries and writings in the books and records of DALCO all in the following manner:

(i) the defendants knowingly caused fictitious journal entries in the books of DALCO, INC., indicating that a $275,000 commission was owed to a Houston, Texas company for that company's efforts in securing for DALCO a source of foreign crude oil as well as a source of smaller amounts of domestic crude oil;

(ii) in support of the fictitious journal entries, defendants knowingly created a fictitious invoice from the Houston, Texas company which invoice billed DALCO for the $275,000 commission; and

(iii) in further support of the fictitious journal entries, defendants knowingly created a sham letter which letter was addressed to a foreign crude oil trader which letter referred to the fictitious $275,000 commission and to DALCO's attempts to buy foreign crude oil.

(f) By creating and then concealing fraudulent certifications on domestic crude oil and placing them into the downstream sale and delivery of such crude oil, defendants would by deceit, fraud, and trickery frustrate and hamper the efforts of the FEA and later the DOE to monitor, control, determine, and regulate the maximum lawful selling price of the crude oil in question for DALCO, Western, and any other subsequent purchasers of the crude oil.

(g) The defendants would use and cause to be used the United States mails for the purpose of executing this scheme and artifice to defraud Western and others unknown.

(h) The defendants would transmit and cause to be transmitted certain writings and signals by means of wire communications in interstate commerce for the purpose of executing this scheme and artifice to defraud Western and others unknown.

D. OVERT ACTS

20. In furtherance of the aforesaid conspiracy and in order to effect the objects thereof, defendants W. DARRELL ZANG and LOUIS PORTER did, in the Northern District of Oklahoma and elsewhere, commit among others the following overt acts:

(a) On or about December 7, 1976, W. DARRELL ZANG signed a contract with Western whereby Western agreed to buy from DALCO approximately 10,000 barrels per day of West Texas sour crude oil for the month of December, 1976.

(b) On or about May 18, 1977, W. DARRELL ZANG signed a contract with Western whereby Western agreed to buy from DALCO approximately 19,000 barrels per day of West Texas sour crude oil for the months of June and July, 1977.

(c) On or about August 14, 1977, W. DARRELL ZANG signed a contract with Western whereby Western agreed to buy from DALCO approximately 15,000 barrels a day in September, 1977, 10,000 barrels a day in October, 1977, 15,000 barrels a day in November, 1977, and 20,000 barrels a day in December, 1977 of West Texas sour crude oil.

(d) On or about August 12, 1977, W. DARRELL ZANG signed a contract with Cities Service whereby DALCO agreed to buy 6,500 barrels a day of West Texas intermediate crude oil for the month of August, 1977.

(e) On or about January 21, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 1-7736 in the amount of $3,611,500.00 to be sent to Western for crude oil sold in December, 1976.

(f) On or about July 29, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 7-1577 in the amount of $208,811.03 to be sent to Western for crude oil sold in June, 1977.

(g) On or about July 14, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 5-1577B in the amount of $4,715,491.83 to be sent to Western for crude oil sold in June, 1977.

(h) On or about August 11, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 8-1477 in the amount of $897,833.73 to be sent to Western for crude oil sold in July, 1977.

(i) On or about August 11, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 8-1377 in the amount of $5,648,576.88 to be sent to Western for crude oil sold in July, 1977.

(j) On or about September 13, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 9-1477 in the amount of $2,734,233.38 to be sent to Western for crude oil sold in August, 1977.

(k) On or about September 13, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 9-1577 in the amount of $1,911,018.07 to be sent to Western for crude oil sold in August, 1977.

(l) On or abouth October 14, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 10-1977 in the amount of $4,109,219.21 to be sent to Western for crude oil sold in September, 1977.

(m) On or about October 14, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 10-1777 in the amount of $1,054,098.66 to be sent to Western for crude oil sold in September, 1977.

(n) On or about October 14, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 10-1877 in the amount of $1,168,623.97 to be sent to Western for crude oil sold in September, 1977.

(o) On or about November 21, 1977, W. DARRELL ZANG caused a TELEX message amounting to an invoice from DALCO CRUDE, INC. in the amount of $8,851,589.41 to be sent to Western for crude oil sold in October, 1977

(p) On or about December 12, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 12-0177 in the amount of $7,266,188.47 to be sent to Western for crude oil sold in November, 1977.

(q) On or about January 12, 1978, W. DARRELL ZANG caused DALCO INC. Invoice No. C-0104 in the amount of $9,042,948.00 to be sent to Western for crude oil sold in December, 1977.

(r) On or about February 13, 1978, W. DARRELL ZANG caused DALCO, INC. Invoice No. C-0106 in the amount of $5,998,004.00 to be sent to Western for crude oil sold in January, 1978.

(s) On or about March 12, 1978, W. DARRELL ZANG caused DALCO, INC. Invoice No. C-0112 in the amount of $1,358,364.00 to be sent to Western for crude oil sold in February, 1978.

(t) On or about April 18, 1978, W. DARRELL ZANG caused DALCO, INC. Invoice No. C-0122 in the amount of $1,499,269.69 to be sent to Western for crude oil delivered in March 1978.

(u) On or about May 12, 1978, W. DARRELL ZANG caused a TELEX message to be sent to Western indicating that DALCO, INC. had sent invoices to Western in the total amount of $2,607,653.15 for crude oil sold in April, 1978.

(v) On or about June 12, 1978, W. DARRELL ZANG, caused DALCO, INC. Invoice No. C-0134 in the amount of $2,999,840.97 to be sent to Western for crude oil sold in May, 1978.

(w) On or about July 7, 1978, W. DARRELL ZANG caused DALCO, INC. Invoice No. C-0142 in the amount of $2,918,193.32 to be sent to Western for crude oil sold in June, 1978.

(x) On or abount August 11, 1978, W. DARRELL ZANG caused DALCO, INC. Invoice No. C-0151 in the amount of $3,096,512.56 to be sent to Western for crude oil sold in July, 1978.

(y) On or about September 8, 1978, LOUIS PORTER caused Sharon Hamm to type a letter addressed to Falcon Petroleum Ltd., in Hamilton, Bermuda.

All in violation of Title 18, United States Code, Section 371.

COUNTS 2 THROUGH 7

1. Paragraphs 1 through 17 and 19 of Count 1 are hereby realleged and incorporated as though set forth in full herein, as constituting and describing defendants' scheme and artifice to defraud and to obtain money and property by false and fradulent pretenses and representations.

2. On or about the dates set forth below, within the Northern District of Oklahoma, defendants

W. DARRELL ZANG and LOUIS PORTER

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be placed in an authorized depository for mail matter, to be sent and delivered by the United State Postal Service to the addresses listed below, according to the directions thereon, following items:

COUNTS	DATE	ADDRESSEE	ITEMS MAILED
2	8-11-77	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Crude, Inc., Invoice No. 8-1377 in the amount of $5,648,576.88 for crude oil delivered in July, 1977

COUNTS	DATE	ADDRESSEE	ITEMS MAILED
3	9-13-77	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Crude, Inc., Invoice No. 9-1477 in the amount of $2,734,233.38 for crude oil delivered in August, 1977
4	10-14-77	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Crude, Inc. Invoice No. 10-1977 in the amount of $4,019,219.21 for crude oil delivered in September, 1977
5	12-12-77	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Crude, Inc., Invoice No. 12-0177 in the amount of $7,266,188.47 for crude oil delivered in November, 1977
6	1-12-77	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Inc., Invoice No. C-0104 in the amount of $9,042,948.00 for crude oil deliverd in December, 1977
7	2-13-78	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Inc., Invoice No. C-0108 in the amount of $5,998,004.00 for crude oil delivered in in January, 1978

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNTS 8 THROUGH 15

1. Paragraphs 1 through 17 and 19 of Count 1 are hereby realleged and incorporated as though set forth in full herein, as constituting and describing defendants' scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses and representations.

2. On or about the dates set forth below in the Northern District of Oklahoma, the defendants

W. DARRELL ZANG and LOUIS PORTER

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did transmit and cause to be transmitted certain signs, signals, and sounds in interstate commerce by means of wire communications in that they caused wire transfers of funds from the Continental National Bank in Chicago, Illinois, to the Fourth National Bank in Tulsa, Oklahoma, for deposit in accounts assigned to DALCO CRUDE, INC., DALCO, INC., and/or The Bank of Montreal, as set forth below:

COUNT	APPROXIMATE DATE OF TRANSFER	AMOUNT OF DEPOSIT
8	7-22-77	$4,915,244.36
9	11-21-77	$8,851,589.41
10	3-23-78	$1,350,664.00
11	4-28-78	$1,494,102.60
12	5-22-78	$2,607,653.15
13	6-22-78	$2,999,840.97
14	7-17-78	$2,918,193.32
15	8-21-78	$3,096,512.56

All in violation of Title 18, United States Code, Sections 1343 and 2.

COUNT 16

1. Paragraphs 1 through 17 and 19 of Count 1 are hereby realleged and incorporated as though set forth in full herein.

2. From approximately June, 1977, to December, 1977, in the Northern District of Oklahoma, the defendants

W. DARRELL ZANG and LOUIS PORTER,

having received monies derived directly or indirectly from a pattern of racketeering, did willfully and knowingly use and invest, directly or indirectly, a part of such income and the proceeds of such income in acquisition of an interest in and the establishment and operation of DALCO INVESTMENTS, an enterprise which was engaged in interstate commerce and in activities which affected interstate commerce, in violation of Title 18, United States Code, Section 1962(a).

3. As defined by Title 18, United States Code, Sections 1961(1)(B) and 1961(5), the pattern of racketeering activity consisted of and included each and all of the Federal crimes of mail fraud and wire fraud alleged in Counts 2 through 5 and 8 and 9 of this Indictment, the allegations of which are hereby incorporated by reference as if fully set forth herein.

4. Among the methods used by defendants to carry out the acquisition, establishment, and operation of the enterprise was to transfer DALCO INVESTMENTS out of the gross profit obtained from the Cities Service to Western transactions approximately $1,067,576.00.

5. Through the aforesaid pattern of racketeering activity and the aforesaid investment and use of income received from the pattern of racketeering, defendant ZANG did acquire, establish and maintain his fifty per cent (50%) interest in the enterprise, including his fifty per cent (50%) interest in the office building at 2431 East 51 Street, Tulsa, Oklahoma, which building is owned exclusively as an asset of DALCO INVESTMENTS, therby making his fifty per cent (50%) interest in DALCO INVESTMENTS, including

his fifty percent (50%) interst in the aforedescribed office building, subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1).

6. Through the aforesaid pattern of racketeering activity and the aforesaid investment and use of income received from the pattern of racketeering, defendant PORTER did acquire, establish and maintain his fifty per cent (50%) interest in the enterprise, including his fifty per cent (50%) interest in the office building at 2431 East 51 Street, Tulsa, Oklahoma, which building is owned exclusively as an asset of DALCO INVESTMENTS, thereby making his fifty percent (50%) interest in DALCO INVESTMENTS, including his fifty per cent (50%) interest in the aforedescribed office building, subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1).

All in violation of Title 18, United States Code, Section 1962 (a), 1963 and 2.

A TRUE BILL

FOREMAN OF THE GRAND JURY

HUBERT H. BRYANT
United States Attorney

Stephen P. Learned
United States Department of Justice

Richard M. Fishkin
United States Department of Justice

APPENDIX 6

Court's Instruction to the
Jury Re: False Exculpatory Statement

An attempt to fabricate evidence by a defendant after a violation of law has occurred is not, of course, sufficient to establish guilt. You may consider evidence of such an attempt, however, along with all of the other evidence in the case in determining guilt or innocence. Whether or not attempts at fabrication of evidence show consciousness of guilt and the significance to be attached to any such attempt are matters for the jury to determine. (TR. 2104)